SUPREME COURT, U. S.

No. 1121

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IN THE

Supreme Court of the United States

October Term, 1970

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND UNITED STEELWORKERS OF AMERICA, LOCAL UNION No. 2176,

Petitioners,

v.

VULCAN MATERIALS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. ——

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND UNITED STEELWORKERS OF AMERICA, LOCAL UNION No. 2176,

Petitioners,

v.

VULCAN MATERIALS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 22, 1970 (rehearing denied September 18, 1970).

OPINIONS BELOW

The opinion of the district court appears at 71 LRRM 2300 and is reproduced in the Appendix to this petition at *App.* 22-32.[1] The opinion of the Court of Appeals is reported at —— F.2d ——, 74 LRRM 2818 and is reproduced in the Appendix to this petition at *App.* 1-20. The denial of rehearing, 75 LRRM 2240, is reproduced at *App.* 21.

[1] The Appendix to this petition is separately paginated, and is referred to herein as "*App.*"

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1970. A timely petition for rehearing was denied on September 18, 1970. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When the arbitration clause of a collective bargaining agreement is so broad ("any local trouble aris[ing] in any plant") that a normal reading would encompass an employer's damage claim against his union for a secondary boycott, should arbitration nevertheless be denied (as it was by the lower courts herein) "absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims"?

2. When an employer sells a portion of his plant to a new company formed by some of his supervisors, who continue its operations unchanged, and the employer acquires a security interest in the new company, and the operations retained by the employer and those of the new company are substantially intertwined, is the employer a "neutral" entitled to the protections of Sections 8(b)(4) of the LMRA when the Union calls a strike against the new company?

3. Does a union violate Section 8(b)(4) by picketing a gate used by both primary and secondary employers, with a sign clearly indicating that its dispute is solely with the primary employer?

4. Does a union violate Section 8(b)(4) by picketing a gate used by secondary employees who perform essential daily services for the primary employer, with a sign clearly indicating that its dispute is solely with the primary employer?

5. Does a union violate Section 8(b)(4) even though it engages only in primary picketing, because secondary employees who see the sign refuse to go to work for the secondary employer?

STATEMENT OF THE CASE

For many years, petitioners United Steelworkers of America, AFL-CIO and its Local 2176 (hereafter collectively "the Union") had been the exclusive bargaining representative of all the employees at the Gadsden, Alabama facility of respondent Vulcan Materials Company (hereinafter "Vulcan"). This facility processed slag materials and manufactured concrete products. The two operations were physically interrelated. Some of the slag was used in the manufacture of the concrete products. All of the employees were in a single bargaining unit, covered by a single bargaining agreement, and many had duties requiring work in both the slag and concrete operations.

The collective bargaining agreement was due to expire on December 31, 1967, and negotiations for a new agreement commenced in early November, 1967. Vulcan requested that the parties negotiate two collective bargaining agreements, one for the slag operation and another for the concrete operation. The Union resisted, urging negotiation of a single agreement as in the past. Thereafter, in late November, without prior notice to the Union, Vulcan made an oral commitment to sell the concrete operation to Forman Ready-Mix Company ("Forman"). Forman was a new company; its owners were persons who until then had been supervisors employed by Vulcan. The Union was notified of the prospective sale on December 1, 1967, and the sale was actually consummated on December 29, 1967. Under the terms of the sale, Vulcan received 60% of the purchase price in cash, and a security interest in Forman's plant and equipment. Until the remainder was paid, Forman was not permitted, without Vulcan's written consent,

to make changes in its business operations, alter its structure, make loans, pay dividends, increase management salaries, etc.

After the sale, the two operations remained physically interrelated, and were carried on in the same manner, utilizing the same employees, equipment and materials as before the sale. There was no sign identifying the concrete operation as belonging to Forman; instead the pre-sale sign (identifying the entire operation as belonging to Vulcan) remained. Forman's delivery trucks were not identified as such, but rather continued to bear the Vulcan name and trade symbol. The two companies shared the cost of water, electricity, diesel fuel and gasoline, and even utilized a joint telephone number. Vulcan and Forman employees used the same time clock, intermingled their time cards in a common rack, and used the same bathhouse and locker room. One employee (on the Vulcan payroll) maintained the payrolls for both companies, and employees of both came to this individual to receive their paychecks.[2] Another Vulcan employee did the purchasing for both companies. A Forman employee served as salesman for both companies. A Vulcan employee kept the inventory for both companies. A Vulcan employee performed inspection services for both companies. The services of four clerical employees and a janitor were shared jointly by the two companies.

Most important, the work of the production employees involved substantial interchange between the two companies. Pursuant to an agreement between the two companies, many of the employees on the Vulcan payroll performed essential daily services for Forman. In addition, Forman's dispatcher and superintendent oversaw the pick-up, loading and delivery of Vulcan's slag product to its customers. Indeed, the employees even retained common seniority rights, were entitled to transfer from Vulcan to For-

[2] The checks, however, were drawn on separate (Vulcan and Forman) accounts.

man jobs and vice versa, and continued to do so down to and even after the strike.

Prior to the sale, there had been a single gate into the Vulcan plant. After the sale, a second gate was cut, adjacent to the first, which was designated for use by Forman employees. However, employees of both Vulcan and Forman could reach their workplaces through either gate, and in fact most Vulcan and Forman employees continued to use the old "Vulcan" gate.

After the sale, Vulcan refused to bargain with the Union with respect to the concrete operation. The Union requested joint negotiations with Vulcan and Forman, but Vulcan refused. On December 31 (the date the old Vulcan agreement was due to expire) the Union entered into a new three-year agreement with Vulcan limited to the slag operation. This agreement provided, *inter alia*, that the parties would arbitrate if any "differences arise between the Company and the Union . . . as to the interpretation and application of the provisions of this Agreement, *or should any local trouble arise in any plant*" (Emphasis added). The agreement also contained a no-strike clause.

The Union negotiated with Forman during December with respect to the concrete operation, but was unable to reach agreement. (Forman was proposing an agreement vastly inferior to the Vulcan agreement.) The Union and Forman agreed that negotiations would continue on a day-to-day basis following the expiration of the former Vulcan agreement, and that during such period Forman would continue in effect the existing terms and conditions of employment which had been provided by Vulcan. This arrangement lasted until mid-February, 1968, when the Union called a strike against Forman in support of its bargaining demands.

Prior to the commencement of the strike, Local 2176 conducted a strike vote. Although its membership included both the Vulcan and Forman employees, only the latter

were permitted to vote. They voted to strike, and the strike was commenced at midnight February 13, 1968. Picket signs were posted on the access road to the two gates, announcing that the Union was on strike *against Forman*. The picketers were Forman employees, except for two officers of Local 2176 who happened to be Vulcan employees at the start of the strike. (One of these two was transferred from the Vulcan to the Forman payroll during the course of the strike.) Although the Union repeatedly advised its Vulcan members that it was not on strike against Vulcan, and urged them to report to work, the Vulcan employees did not report to work during the strike. The Company, in the midst of the strike, cut a third gate for the use of Vulcan employees. This gate was in clear view of the Union's picket signs, and the Vulcan employees still did not report for work.

Vulcan filed a charge with the NLRB alleging that the Union was conducting a secondary boycott violative of Section 8(b)(4). The Union thereupon called a meeting of all its members, reiterated that it was not on strike against Vulcan, and requested all who intended to continue absenting themselves from work to sign the following affidavit:

> "We work at Vulcan Materials in Gadsden and belong to the same local as men at what is now called Forman Ready-Mix. The Local and International told us that we are not on strike and have a contract and should return to work. As individuals we have decided not to work."

All of the Vulcan employees signed the affidavit, and all continued to remain away from work until the strike ended, on March 15, 1968. Vulcan withdrew its NLRB charge, and no 8(b)(4) complaint ever issued.

During the course of the strike Vulcan instituted the present action, pursuant to Sections 301 and 303 of the LMRA, alleging that the Union was violating the no-strike pledge

in the Vulcan agreement as well as Section 8(b)(4) of the LMRA. The Union moved for a stay of the action pending arbitration. Before this motion was decided, Vulcan amended its complaint to drop the 301 claim. The district court then denied the motion, holding that the 303 claim was not arbitrable.

The case proceeded to trial on the 303 claim, with the Union advancing two principal defenses: (1) that in light of the relationship between Vulcan and Forman, Vulcan was not a "neutral" entitled to the protection of the secondary boycott provisions; and (2) that in any event, the Union's conduct constituted lawful primary picketing in support of its strike against Forman.

The district court decided both issues against the Union, and entered a judgment in Vulcan's favor for $24,621.36 plus court costs. The Union appealed, raising *inter alia* its claims that the dispute was arbitrable, that Vulcan was not a "neutral," and that its conduct constituted lawful primary picketing. The Court of Appeals affirmed.

On the arbitration issue, the court below did *not* hold that the normal meaning of the arbitration clause ("should any local trouble arise in any plant") would not encompass this dispute. Instead, it applied a restrictive rule of construction: that 303 suits would be ordered to arbitration only if the agreement contained a "clear, explicit . . . statement . . . directing an arbitrator to hear and determine the validity of tort damage claims" (*App.* 19-20).

On the neutrality issue, the court below recognized that "it has been held that" neutrality does not exist where "the economic fortunes of the two companies are inextricably interwoven" or where "there is a substantial integration of the two employers at the operational level" (*App.* 5). It concluded that these decisions were inapplicable, however, because "the factors relied on by the Unions to establish economic and operational integration are largely incidental

to the necessary transition from the complete economic and operational integration of the slag and concrete facilities prior to the sale of the concrete facility to Forman and the disintegration which would be consistent with separate ownership and operation of the two facilities" (*App.* 8-9). In the view of the court below, the Union had been beguiled by the "incidental trappings" of the relationship between Vulcan and Forman, rather than its "essence," in believing Vulcan not to be a neutral (*App.* 9, 10).

Having concluded that Vulcan was a neutral entitled to the protections of Section 8(b)(4), the court below went on to hold that the Union's conduct during the strike was "secondary" and therefore violative of 8(b)(4). The Court's approach was to quote the literal language of Section 8(b)(4), and then to find that the Union's conduct fitted that literal language (*App.* 14). Nowhere in its opinion did the court refer to this Court's major decisions articulating the distinction between primary and secondary activities at industrial plants,[3] although these decisions had been emphasized in the Union's brief to it. The factors which persuaded the court that the Union had violated Section 8(b)(4)(i) were the following:

(1) The Union's picket line was placed at a point which would require employees to cross it in order to enter either of the gates to the Vulcan-Forman complex. "Although the Forman employees had continued to use the Vulcan gate after the transfer of the concrete plant to Forman and up until the strike, a second gate was in existence next to the original Vulcan gate and designated for the use of Forman employees." Despite a request from Vulcan's manager, the Union refused to confine its picketing to the "Forman" gate. (*App.* 11).

(2) "On March 4, 1968, a new gate into the Vulcan slag plant was opened above the existing gate and outside

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[3] *Local 761* v. *NLRB (General Electric Co.)*, 366 U.S. 667 (1961); *United Steelworkers* v. *NLRB (Carrier Corp.)*, 376 U.S. 492 (1964).

the Union's picket line, but in full view of it. The gate was called to the attention of the Unions, but Vulcan employees refused to utilize the gate and continued to refuse to return to work." (*App.* 11-12).

(3) Two of the picketers were officials of the Local, both of whom were Vulcan employees (albeit one was transferred to Forman during the pendency of the strike). One of these, although urging Vulcan employees to return to work, stated that he himself would not cross the Forman picket line (*App.* 12).

(4) The International Union's Staff Representative "took no action other than urging individual Vulcan employees not to strike" (*App.* 12). When Vulcan threatened legal action, he advised Vulcan employees that they "were not violating any laws" (*App.* 12).

(5) The meeting at which Vulcan employees were told to return to work, and asked to sign the affidavit (*quoted supra*) if they intended to continue to absent themselves, constituted inducement and encouragement of their continued absence (*App.* 12, 16).

(6) "It is well established that as long as a union is functioning as a union it must be held responsible for the mass action of its members." (*App.* 14). The union failed to take "steps to 'overcome the normal appeal of a picket line' as required by *Superior Derrick Co.* v. *NLRB*, 5 Cir., 1960, 273 F. 2d 891, cert. den. 364 U.S. 816" [a decision expressly disapproved by this Court in *Local 761, supra*, 366 U.S. at 677] (*App.* 15).[4]

[4] The court also found that a Union employee had made a threat to Vulcan's management, conduct which would violate a separate provision, Section 8(b)(4)(ii) (*App.* 14, 16). That threat, however, even if made, was not responsible for Vulcan's damages. The damages which were awarded resulted from the absence of the Vulcan employees, and if the finding that that absence was unlawfully induced is erroneous, so is the award of damages.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947 (hereinafter "the Act"), 61 Stat. 156, 29 U.S.C. § 185(a) provides as follows:

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Sections 303 and 8(b)(4) of the Act, 29 U.S.C. §§ 187 and 158(b)(4) are set forth in relevant part in the appendix hereto, at *App.* 2, n. 1.

REASONS FOR GRANTING THE WRIT

This case poses issues in three areas which are of general importance and warrant review by this Court: (1) the test for determining arbitrability of secondary boycott damage claims; (2) the standards for determining when a company's economic affairs are so intertwined with those of the primary employer that it is not a "neutral" entitled to the protections of Sections 8(b)(4); and (3) the standards for differentiating "primary" from "secondary" picketing.

I. ARBITRATION OF SECONDARY BOYCOTT DAMAGE CLAIMS

The agreement in this case provided for arbitration not only of breach of contract claims, but also "if any local trouble arises in any plant." The ordinary meaning of this phrase would encompass the dispute involved in this case, and the court below did not suggest otherwise. Nevertheless, the court below refused to order the dispute arbitrated. It reached that result by applying a restrictive standard,

akin to that used in the commercial arbitration field, i.e. that the contract would not be construed as providing for arbitration of 303 damage claims "absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another."

The approach of the court below is a substantial departure from the hospitality which this Court has heretofore accorded labor arbitration. Whether 303 damage claims are so unique that they warrant this different treatment is a question which should be decided by this Court.

In the "Trilogy" of Steelworkers cases decided in 1960,[6] this Court declared that: "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960). The rule of construction fashioned for labor disputes was that: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83.

Each of the Trilogy cases involved a union's effort to arbitrate its claim that the employer was violating the collective bargaining agreement, and some of the reasons given by this Court for fashioning so generous a rule applied *only* to such disputes. Thus the Court noted that the employer's agreement to arbitrate is the *quid pro quo* for the union's agreement not to strike, *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567 (1960), and that labor arbi-

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[6] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tration is the substitute for industrial strife rather than (as in commercial arbitration) for litigation, *Warrior & Gulf, supra*, 363 U.S. at 578. It was possible to read these cases, therefore, as being inapplicable to employer damage claims against unions, where arbitration is indeed the substitute for litigation, and the *quid pro quo* rationale is inapplicable. This Court soon had occasion to dispel these notions, however, and to hold that the rule of construction favoring arbitration of labor disputes extends to employer damage claims as well.

In *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254 (1962), an employer sued a union for damages for a strike in violation of a no-strike clause. The union moved that the suit be stayed pending arbitration. The employer resisted arbitration, arguing that "the parties cannot have intended to arbitrate so fundamental a matter as a union strike in breach of contract, and . . . only an express inclusion of a damage claim by the employer would suffice to require arbitration." 370 U.S. at 258-59. This Court rejected the employer's proposed rule of construction, and instead applied the rule which had been enunciated in the Trilogy. Noting that the agreement contained an extremely broad arbitration clause (Article V),[6] the Court declared:

> "[I]t appears more reasonable to us to expect such a matter, if it is indeed so fundamental and so basic to the company under the contract, to have been excluded from the comprehensive language of Article V if the parties so intended . . . Instead, the inclusive coverage of Article V was left intact." (370 U.S. at 259-260).

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[6] "Article V does not stop with disputes 'involving questions of interpretation or application of any clause or matter' covered by the contract. The adjustment and arbitration procedures are to apply to all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relation between the parties, directly or indirectly." 370 U.S. at 258.

The Court was not persuaded that a different approach should be taken because the *quid pro quo* rationale was inapplicable (370 U.S. at 261, n. 7), nor because arbitration was here a substitute for litigation rather than industrial strife:

> "If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. *We simply remit the company to the forum it agreed to use for processing its strike damage claims. That forum, it is true, may be different from a courtroom, but we are not persuaded that the remedy there will be inadequate.*" (370 U.S. at 266; emphasis added).

Only one member of this Court, Mr. Justice Harlan, thought the narrower standard advocated by the employer was warranted:

> "Whether a strike in breach of contract has occurred and, if so, what damages have been suffered, are matters with respect to which a court of law can hardly be deemed less competent, as an adjudicator, than an arbitrator. There is no special reason to suppose that the parties preferred to submit this kind of a dispute to an arbitrator whose expertise is more likely to be in the area of employees' grievance claims, as in [the Trilogy] . . .
>
> "It would require more persuasive evidence than either this collective agreement or record affords to persuade me that it was contemplated that the employer would forego his statutory remedy under § 301 . . ." (370 U.S. at 267-68).

Drake Bakeries thus held that an employer's damage claim was arbitrable under a broad arbitration clause even though the clause did not *expressly* provide that damage

claims are arbitrable. In the instant case, the court below refused to order arbitration of the employer's damage claim for the very reason rejected in *Drake Bakeries:* the absence of an express provision that damage claims are arbitrable.

In its decision, the court below deemed "controlling" the Second Circuit's decision in *Old Dutch Farms, Inc.* v. *Milk Drivers Union*, 359 F. 2d 598 (2d Cir. 1966), cert. denied 385 U.S. 832 (1966). In *Old Dutch*, the Second Circuit refused to stay a 303 action pending arbitration, under an arbitration clause much narrower than that in the instant case.[3] While the court pointed out that 303 claims would not be arbitrable even on a normal reading of the arbitration clause there involved (359 F. 2d at 601),[4] it went on in *dictum* to announce the rule of construction which the court below followed (*Id.* at 603). The Second Circuit did not believe *Drake Bakeries* precluded that approach, for *Drake Bakeries* involved a damage claim for breach of contract, whereas 303 damage claims are for breach of a statutory obligation. In the Second Circuit's view, the Trilogy standard is applicable only to breach of contract claims (359 F. 2d at 602-604). This attempted distinction will not survive a reading of *Drake Bakeries*, and it conflicts with decisions in several Circuits applying the Trilogy standard to arbitration of noncontractual disputes.

While *Drake Bakeries* did involve a claim for breach of contract, this Court did not make that fact the touchstone of its decision. On the contrary, it emphasized that the

[3] In *Old Dutch*, the agreement called for arbitration of "any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this agreement" (359 F.2d at 600).

[4] [N]othing in the broad arbitration clause involved here commits to arbitration disputes which are unrelated to the interpretation of particular provisions of the collective agreement or to the subject matter of the agreement." 359 F.2d at 601.

arbitration clause "does not stop with" breach of contract claims, but goes on to encompass "all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party . . ." 370 U.S. 258. This Court then went on to hold the dispute arbitrable not under the breach of contract language, but under this additional language. It concluded that the employer "has a 'complaint' against the union concerning the 'acts' or 'conduct' of the union. There is also involved a 'dispute' between the union and the company, for the union denies that there was a strike at all, denies that it precipitated any strike, denies that the employees were obligated under the contract to work on that January 2, and itself claims that the employer breached the contract in scheduling work for the holidays," *Ibid.*[9] The Court ordered arbitration not because the underlying dispute was contractual, but because arbitration was the forum which the employer had agreed to use for processing all of its claims against the union (370 U.S. at 266).

Here, as in *Drake Bakeries*, and unlike *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241-42 (1962), "the parties *did* . . . intend to commit all of their possible disputes and the whole scope of their relationship to the grievance and arbitration procedures . . ." (emphasis added). Whether that intention should be frustrated by restrictive rules of construction such as that suggested in *Old Dutch* and followed by the court below, is a question which should be decided by this Court.

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[9] The Court's reliance on this part of the *Drake* arbitration clause was also made clear in the companion opinion in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 242, n. 3 (1962):

> "In *Drake Bakeries, Inc.* v. *Local 80*, *post*, p. 254, decided this day, the question of arbitrability of a damages claim for breach of a no-strike clause is considered and resolved in favor of arbitration in the presence of an agreement to arbitrate 'all complaints, disputes or grievances arising between them [i.e. the parties] involving . . . any act or conduct or relation between the parties'."

The decision below, and *Old Dutch*, in confining the Trilogy's hospitable rule for construing arbitration clauses to breach of contract claims, conflict with decisions of the First, Third, Fourth, Seventh, Eighth and Ninth Circuits, as well as with a later decision of the Second Circuit. All of these courts have applied the Trilogy standard to, and ordered arbitration of, non-contractual disputes. Three of these Circuits have ordered arbitration of *the terms of a new contract*, because the arbitration clause was so broad as to encompass even that subject.[10] Another ordered arbitration of a union's quest for a higher wage rate classification, under an agreement providing for arbitration of "any differences or misunderstandings which may arise."[11] Yet another ordered arbitration of a union's grievance over the employer's unilateral withdrawal of a gas discount previously provided his employees, under an agreement providing for arbitration of "any disagreement" between the parties.[12] And another enforced an arbitration award resolving a jurisdictional dispute between two unions.[13] See also, *Association of Industrial Scientists* v. *Shell Development Co.*, 348 F. 2d 385 (9th Cir. 1965), where the court held

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[10] *Builders Ass'n of Kansas City* v. *Greater City Lab. D.C.*, 326 F.2d 867 (8th Cir. 1964), cert. denied 377 U.S. 917 (1964) (agreement called for arbitration of "any differences which may occur between" the employer and the union); *Winston-Salem Printing Press & A.U.* v. *Piedmont Pub. Co.*, 393 F.2d 221 (4th Cir. 1968) (agreement expressly provided for arbitration of new contract terms if the parties could not agree); *Seltzer & Co.* v. *Livingston*, 361 F.2d 218 (2d Cir. 1966), affirming 253 F. Supp. 509 (S.D. N.Y. 1966) (same). The court below is the only court which has refused to apply the Trilogy standard to the arbitration of new contract terms. *Austin Mailers Union* v. *Newspapers, Inc.*, 329 F.2d 312 (5th Cir. 1964), cert. dismissed pursuant to Rule 60, 377 U.S. 985 (1964).

[11] *Acme Markets, Inc.* v. *Retail Clerks*, 344 F.2d 330 (3rd Cir. 1965), affirming 235 F.Supp. 814 (E.D. Pa. 1964).

[12] *Local Union No. 702* v. *Central Ill. Pub. Serv. Co.*, 324 F.2d 920 (7th Cir. 1963).

[13] *Sheet Metal Workers' Union* v. *Aetna Steel Products Corp.*, 359 F.2d 1 (1st Cir. 1966).

the Trilogy standards applicable to a grievance of employees ordered to transfer from one plant to another under penalty of discharge, and the agreement provided for arbitration "on any subject."[14]

In each of the above cases, the dispute was one which did not involve the interpretation, application, or alleged violation of a collective bargaining agreement. Nevertheless, in each the Trilogy standard was expressly applied. The stakes in each of the above cases were higher than those involved in the instant case, for arbitration meant not merely the denial of a courtroom (as here) but the surrender of the resisting party's power to control his own destiny. If the Trilogy standard applies to that type of arbitration, *a fortiori* it ought to apply here.

II. NEUTRALITY

Section 8(b)(4) was enacted to prevent "neutrals" from suffering "pressures in controversies not their own." *NLRB* v. *Denver Building Council*, 341 U.S. 675, 692 (1951). As Senator Taft explained, in urging its adoption, it protects only "a third person who is *wholly unconcerned* in the disagreement between an employer and his employees," 93 Cong. Rec. 4323 (1947; emphasis added) or, as he later put it, "a third person who is not involved *in any way* in the dispute or strike . . ." 93 Cong. Rec. 8709 (1949; emphasis added).

This Court has never defined the standards for determining when an employer's involvement with the primary employer is sufficient to destroy neutrality. The Board and the lower courts, while uniformly agreeing that *some* secondary employers are not neutrals, have articulated a different

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[14] And see *Goldstein* v. *Corbin*, —— N.Y.S. 2d ——, 63 LRRM 2248 (Sup. Ct. N.Y. Co. 1966) (ordering arbitration of a claim for damages for assault, under an agreement providing for arbitration of "all complaints, disputes or grievances . . . relating to . . . any acts, conduct or relation [between the parties]").

standard in every case, with the result that there is no consistency whatsoever between their decisions.[10] *Cf. Loc. No. 24, Inter Bro. of Teamsters* v. *NLRB*, 266 F. 2d 675 (D.C. Cir. 1960); *Truck Drivers* v. *Empire State Express*, 293 F. 2d 414 (5th Cir. 1960), cert. denied 368 U.S. 931 (1961); *Building Service Employees* v. *NLRB*, 313 F. 2d 880 (D.C. Cir. 1963); *Local 282, Int'l Bro. of Teamsters*, 137 NLRB 1321 (1962) (all holding the secondary not to be a neutral) *with Retail Fruit & Veg. Clerks* v. *NLRB*, 249 F. 2d 591 (9th Cir. 1957); *United Mine Workers* v. *Osborne Mining Co.*, 279 F. 2d 716 (6th Cir. 1960), cert. denied 364 U.S. 881 (1960); *Sheet Metal Workers* v. *Atlas Sheet Metal Co.*, 384 F. 2d 101 (5th Cir. 1967) (holding the secondary employer to be a neutral).

We believe the decision below is plainly wrong in finding Vulcan to be "wholly unconcerned" with the dispute between the Union and Forman. Vulcan *created* the dispute, by selling a portion of the plant to its supervisors in the midst of its negotiations with the Union; it retained control over Forman's activities through the conditions it imposed at the time of sale; and operationally the two segments of the plant remained wholly intertwined. (The court below opined that this interrelationship was "transitional," and could be expected to disappear with time. Whatever the significance of that prediction to future rights of the Union, it is difficult to see its relevance to the Union's conduct at a time when the interrelationship clearly existed.)

The confusion which exists over the appropriate standards for determining neutrality — stemming from the absence of any decision by this Court—is highly detrimental

[10] The lone exception is the employer who undertakes to do "farmed out work" (i.e. work referred by the primary employer which, but for the strike, would have been performed by the striking employees). The cases uniformly have held, following a landmark Second Circuit decision, *NLRB* v. *Business Machine*, 228 F.2d 553 (2d Cir. 1955), cert. den. 351 U.S. 962 (1956), that such an employer is an "ally" and not a "neutral".

to Union and employee interests. Unions are disabled from intelligently advising employees of their rights, and risk injunctions and damage actions if they guess wrong. The instant case is a good example. As the district court noted, one of the Local's officers "was apparently steeped in the singularity of the adjoining concrete and slag plants and could not visualize the division which the sale of the concrete plant had effectuated" (*App.* 26). In our view the Union officer's perceptions were more acute than those of the courts below; but whether or not that is so, the uncertainty in the governing standard would have made prediction by the most informed legal scholar hazardous, if not impossible. In an area of the law where decisions must be made instantly, and disastrous consequences attend violations, we submit that continuing uncertainty is intolerable.

III. "PRIMARY" vs. "SECONDARY" ACTIVITY

Most of the factors upon which the court below relied to find the Union's activity "secondary" have previously been declared by this Court to be "primary." The decision below directly conflicts with this Court's decisions in *Local 761* v. *NLRB (General Electric Co.)*, 366 U.S. 667 (1961); *United Steelworkers* v. *NLRB (Carrier Corp.)*, 376 U.S. 294 (1964); and *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-390 (1969).

The Court below condemned the Union for not confining its picketing to the "Forman" gate, although it acknowledged that Forman employees regularly used the "Vulcan" gate. In *Local 761*, this Court made clear that a gate regularly used by primary employees may be picketed, irrespective of its denomination or the fact that secondary employees also use it, 366 U.S. at 680-682. The "mixed use in fact of the purportedly separate entrances" entitles the Union to picket. *Jacksonville Terminal*, 394 U.S. at 389-390. Furthermore, the Union was entitled to address picketing directly to the Vulcan employees, for they performed

extensive daily services which were essential to Forman's normal operations. In both *Local 761* and *Carrier*, this Court held that a union may appeal to secondary employees to withhold services which are essential to the primary employer's normal operations.

The court below also condemned the Union because Vulcan employees would not enter the "new" gate, constructed after the strike began. But apart from the fact that the Union did *not* picket that gate, the complete answer is that the Union was *entitled* to picket that gate. As noted, Vulcan employees performed essential daily services for Forman, and under *Local 761* and *Carrier* the Union was entitled to picket at any gate established for their use.

The court below saddled the Union with responsibility because in fact the Vulcan employees did not report to work. It believed that the Union had an affirmative obligation to undo the "secondary effects" of its picketing, even if the picketing was lawful and "primary." For this proposition it cited its prior decision in *Superior Derrick Corp.* v. *NLRB*, 273 F. 2d 891 (5th Cir. 1960), cert. denied 364 U.S. 816 (1960), apparently unaware that this Court expressly disapproved *Superior Derrick* in *Local 761*, 366 U.S. at 677. In *Local 761*, this Court squarely held that, if picketing is confined to that which is lawful and primary, the Union cannot be charged with responsibility because secondary employees refuse to cross, 366 U.S. at 673-674:

> "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. See *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547. '[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers.' *Seafarers Inter-*

> *national Union* v. *Labor Board*, 265 F. 2d 585, 590. 'It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises.' *Id.*, at 591. 'Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success.' Local 294, [284 F.2d] at 890. But picketing *which induces* secondary employees to respect a picket line is not the equivalent of picketing *which has an object of inducing* those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. *Labor Board* v. *International Rice Milling*, [341 U.S. 665]." (Emphasis added)

Thus, the principal bases upon which the court below predicated its liability finding were in direct conflict with prior decisions of this Court. While the court below cited a handful of other occurrences to support its finding (See p. 9, *supra*, items 3, 4 and 5), their relative insignificance and essential ambiguity leaves grave doubt that the court would have found a violation based upon them alone. And even if it had, it could not have sustained the entire damage award, but rather would have had to delete so much as was attributable to primary activity. *Teamsters Union* v. *Morton*, 377 U.S. 252, 261-262 (1964):

> "Since § 303(b) authorizes an award of damages only in the event of injury 'by reason of any violation of sub-section (a)' and peaceful primary strike activity does not violate § 303(a), [citing *Local 761*], the District Court was without power to award damages

> proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere."

See also *Mine Workers* v. *Gibbs*, 383 U.S. 715, 731, n. 17 (1966).

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals
For the Fifth Circuit

No. 28359

VULCAN MATERIALS COMPANY,
Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
and UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 2176,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

(JULY 22, 1970)

Before DYER, SIMPSON and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This is an appeal from a judgment of the Northern District of Alabama for damages in the amount of $24,621.36 against the United Steelworkers of America, AFL-CIO (hereafter, the International) and its Local Union 2176 (hereafter, the Local, and referred to collectively as the Unions) in favor of the Vulcan Materials Company (hereafter, Vulcan), pursuant to Section 303 of the Labor Management Relations Act of 1947, as amended

(hereafter, the Act), 29 U.S.C. § 187, as amended (1965).[1] We affirm.

Prior to December 29, 1967 Vulcan owned and operated a ready-mix concrete plant at Gadsden, Alabama, on premises immediately adjacent to premises on which it

[1] 29 U.S.C. § 187 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title [§ 8(b)(4) of the Act].
>
> (b) Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title [§ 301 of the Act] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 158(b)(4) provides in relevant part that:

> It shall be an unfair labor practice for a labor organization or its agents * * * (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
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> (B) forcing or requiring any person to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title [§ 9 of the Act]: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> * * *

owned and operated a slag plant, which utilized raw materials received from a large blast furnace operation of the Republic Steel Corporation located nearby. On December 29, 1967 Vulcan sold all of its Concrete Products Division facilities in Alabama, Georgia, Florida, Maryland, North Carolina and Tennessee to Forman Ready-Mix Company, division of Kyle, Inc. (hereafter Forman).

In the years preceding the disposition of Vulcan's Concrete Products Division, the production and maintenance employees of Vulcan's entire Gadsden facility, both the concrete plant and the slag plant, had been represented by the Unions and the same collective bargaining agreement covered both sets of employees. The contract expired by its terms on December 31, 1967. Negotiations were entered into between Vulcan and representatives of the Unions in early November, 1967. In the latter part of November, Vulcan made an oral commitment to sell its Concrete Products Division facilities to Forman, and its negotiators informed the Unions of the prospective sale on or about December 1, 1967. The Unions demanded that future negotiations with Vulcan regarding the slag plant employees be held jointly with its negotiations with Forman regarding the concrete plant employees. Vulcan rejected this demand and the negotiations between it and the Unions culminated on December 31, 1967, in a three-year collective bargaining agreement.

Sometime subsequent to December 1, 1967, the Unions entered into negotiations with Forman and when the collective bargaining agreement covering the concrete plant employees expired on December 31st without a new agreement having been reached, it was agreed that the Unions would continue to negotiate with Forman under a temporary arrangement whereby Forman agreed to adopt the terms and conditions of employment identical to those in the expiring contract until a new contract could be agreed upon. This arrangement was terminated by a strike that commenced at

midnight, February 13, 1968, pursuant to a strike vote taken earlier among the Forman production and maintenance employees.

The strike was ostensibly against Forman and in support of the Union's demands previously made during the collective bargaining negotiations with Forman. However, the Unions' picket line was placed on an access road leading to both Forman's and Vulcan's plants, even though separate gates along the common access road had been designated for the employees of each to enter their respective places of employment, the two Vulcan employees were placed in charge of the picket line by the Unions. As a result of this and other conduct detailed below, the strike was totally effective against *both* Forman and Vulcan and remained so until the Unions reached an agreement with Forman and the strike ended on March 15, 1968. During this period, no Vulcan employee crossed the picket line to come to work, save for supervisory personnel, and, consequently, Vulcan's slag operation at the Gadsden plant was virtually shut down.

The district court found, *inter alia*, that neither Forman nor Vulcan was a predominant customer of the other's products; that they were engaged in different businesses, which produce different products; and that there was no interweaving or integration of economic fortunes of Vulcan and Forman, no overlapping of management functions and no actual common control of one by the other, or common ownership, and, therefore, that Vulcan was a neutral secondary employer. Further, the court found that the strike was conducted by both the Local and the International as a joint venture in violation of Section 8(b)(4)(ii)(B) of the Act, proximately causing damages to Vulcan in the amount of $24,621.36.

I. Neutrality.

The central question in this appeal is whether the district court was clearly erroneous in finding that Vulcan was a

neutral secondary employer, that is, "any other employer" as that term is used in Section 8(b)(4)(i)and (ii)(B), so as to be entitled to the protection afforded by the Act.

It has been held that in order for an employer who is subject to a secondary boycott to avail himself of the protection afforded by the statute, it must be neutral and not affiliated or allied with the primary employer and that the neutrality of the secondary employer is destroyed and it is deemed to be an ally of the primary employer for the purposes of Section 8(b)(4) where there is actual common control exemplified by domination of the secondary employer by the primary employer, where there is an overlapping of management function, or where the economic fortunes of the two companies are inextricably interwoven, as, for example, where the secondary employer does substantially all his business with the primary employer or where there is a substantial integration of the two employers of the operational level. *Sheet Metal Wkrs. Int. Ass'n., Loc. 223* v. *Atlas Sheet Metal Co.*, 5 Cir., 1967, 384 F. 2d 101; *Truckdrivers & H. Local U. No. 728* v. *Empire State Express*, 5 Cir., 1961, 293 F. 2d 414, cert. den. 368 U.S. 931. In the final analysis, however, the question of neutrality cannot be answered by the application of a set of verbal formulae. Rather, the issue can be resovled only by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer up against the intent of the Congress as expressed in the Act to protect employers who are "wholly unconcerned" and not involved in the labor dispute between the primary employer and the union.

Prior to December 29, 1967, Vulcan owned and operated both the slag plant and the concrete plant and the employees involved in the two operations were represented by the Unions in the same bargaining unit. On December 29, 1967, Vulcan sold the slag operation to Forman, and as the district court noted, the resulting transfer of employees and

operations from the one company to the other inevitably led to a certain overlap of functions on various levels and other complications making the determination of Vulcan's status difficult.

Vulcan received nearly 60 percent of the purchase price of $10.8 million for its Concrete Products Division in cash and took a collateral installment note and a security interest in the transferred plants and equipment to cover the difference. The collateral installment note contains a provision requiring Vulcan's written consent before Forman can make certain changes in its business operation, alter its structure, make loans, pay dividends, increase certain salaries, etc.[2] On the basis of this provision, the Unions contend that Vulcan retained sufficient legal control over Forman to destroy its neutrality and that the district court's finding that "[t]here was no actual common control of one by the other, or common ownership" is clearly erroneous.

As was pointed out in *Atlas*, supra, 384 F. 2d at 107, it takes *actual* common control, not merely *potential* common

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[2] The provision reads:

> Until all indebtedness evidenced hereby is paid in full; Maker [Forman] will not, without the written consent of Holder [Vulcan]: (a) Voluntarily change its form of business organization, the nature of its business or the existing management of its business; (b) merge or consolidate with any other corporation; (c) purchase, redeem or retire any of its own securities or purchase or otherwise acquire the securities of any other corporation; (d) make any loans or advances to or guarantee in favor of any other person, firm or corporation, except the extension of credit in the ordinary course of business, nor issue any securities which are not subordinate to this note; (e) encumber or mortgage any of its property, except for purchase money security interests; (f) change, alter or amend any real estate lease agreement to which it is a party; (g) declare or pay any dividends whatever or increase the salary [of two named Forman officials above a certain figure]; (h) dispose of any of its assets or make any purchases, sales or leases other than in the ordinary course of its business.

control, to destroy neutrality. Furthermore, it has been held in a somewhat similar case that the retention of certain controls over a lessee's business by a lessor does not preclude the lessees from being neutral secondary employers where the lessor is engaged in a labor dispute. *Retail Fruit & Veg. Clerks U.* v. *National Labor Rel. Bd.*, 9 Cir., 1957, 249 F. 2d 591, 594-95. The provision here in question is commonplace in transactions of this kind to protect the interests of a lendor and there is no evidence that Vulcan has ever been called upon to actually exercise the potential control so provided. The district court's finding of no actual control is not clearly erroneous.

The Unions further contend that Vulcan and Forman were so interrelated, operationally and economically, to preclude Vulcan from asserting neutrality. In doing so, the Unions point to many factors, including the fact that the physical layout of the slag plant and the concrete plant demonstrate a physical interrelation of operations; that before the sale of the concrete plant the employees involved in the two operations constituted a single bargaining unit covered by a single collective bargaining agreement; and that the two operations were carried on after the sale in essentially the same manner, utilizing the same employees, equipment, and material as before the sale. For instance, there was no sign identifying the concrete plant as belonging to Forman, while the sign identifying the entire operation as belonging to Vulcan remained, just as before the sale. Likewise, Forman's concrete delivery trucks still bore the Vulcan name and trade symbol as well as the traditional colors utilized by Vulcan on its vehicles, just as before the sale. After the sale, Vulcan and Forman employees continued to enter the same gate, although another gate had been designated for the use of Forman employees, utilized the same time clock, intermingled their time cards in a common rack, and used the same bathhouse and locker room facilities. The employees of both companies continued

to receive pay from the same place and from the same individual, although the employees received checks drawn on the account of their respective employer.

The Unions made a great deal out of the interchange of certain employees and services pursuant to a working agreement between Vulcan and Forman, whereby Vulcan agreed to provide Forman maintenance personnel, a front-end loader and operator, the switching of railroad cars and crane usage at fixed hourly or monthly rates for certain specified purposes. The two companies agreed to share the services of four clerical employees, pending a further evaluation of the work load, and the services of a janitor. Forman was to be billed for a percentage of a Vulcan employee's salary who rendered inspection services to Forman; and the cost of water, electricity, telephones, diesel fuel and gasoline was prorated between Vulcan and Forman until other arrangements could be worked out.

Likewise, the former Vulcan ready-mix concrete salesman continued in the same capacity for Forman and continued to take orders for both companies until the strike, and the former dispatcher for Vulcan continued in the same capacity for Forman and also continued to perform certain functions for Vulcan, principally in managing the operation on the Vulcan front-end loader.

The Unions also assert that the entire employee complement of Vulcan and Forman was treated as a single seniority unit down to and after the strike. This is not entirely correct. On December 27, 1967, Vulcan agreed with the Unions that long-term employees of the concrete facility who wanted to remain with Vulcan could exercise their accrued seniority under the expiring labor agreement to obtain positions at the Vulcan slag plant. Forman, after separate negotiations with the Unions, agreed to credit its employees with their full seniority previously accrued with Vulcan.

As can be seen, the factors relied on by the Unions to

establish economic and operational integration are largely incidental to the necessary transition from the complete economic and operational integration of the slag and concrete facilities prior to the sale of the concrete facility to Forman and the disintegration which would be consistent with separate ownership and operation of the two facilities. The fact remains that the basic operations and processes performed in the making of slag and performed in the making of concrete are carried out in different plants; that a different product is produced by each and that sales are made to essentially different customers; that Vulcan operates the slag plant for its own account and Forman operates the concrete processing plant for its own account; neither is a major customer of the other's products; and the capital and the management of the companies is entirely separate and independent. Moreover, each carried on its own labor relations independent of the other subsequent to the sale.

In determining whether the relationship of a secondary employer and a primary employer is such as to destroy neutrality, the court must look to the *essence* of the relationship, and not to its incidental trappings. See *Sheet Metal Wkrs. Int. Ass'n Loc. 223* v. *Atlas Sheet Metal Co.*, supra; *Truckdrivers & H. Local U. No. 728* v. *Empire State Express*, supra; *Local No. 24, Inter. Bro. of Teamsters, etc.* v. *N.L.R.B.*, D.C. Cir., 1959, 266 F. 2d 675; *N.L.R.B.* v. *Dallas General Drivers, etc., Local No. 749*, 5 Cir., 1959, 264 F. 2d 642, cert. den. 361 U.S. 814; *Retail Fruit & Veg. Clerks U.* v. *National Labor Rel. Bd.*, supra. Furthermore, there is authority that the fact that two companies share a comman bookkeeper, use the same stationery at the main office; that one performs minor services for the other and bills the other; that both companies are listed in the telephone directory at the same address and with the same telephone number is insufficient to establish that both companies are operated as a single, integrated business enter-

prise so as to destroy neutrality. *Drivers, Chauffeurs and Helpers Local No. 639*, 158 NLRB 1281, (1966). With regard to the interchange of employees and services pursuant to the operating agreement between Vulcan and Forman, it has been held that normally one who hires an independent contractor to perform services, such as the services supplied Forman by Vulcan, will not be considered an employer with respect to the independent contractor's employees, even though the independent contractor and its employees are subject to some quantum of control by the party using their services. *Drivers & Chauffeurs Local Union No. 816, etc.* v. *N.L.R.B.*, 2 Cir., 1961, 292 F. 2d 329, cert. den. 368 U.S. 953 (1962).

The Unions stoutly maintain that the instant situation is controlled by *Empire Express*, supra, and that, under that decision, the district court's finding that Vulcan was a neutral secondary employer is error. The Unions, however, have mistaken certain incidental aspects of the primary-secondary employer relationship in *Empire*, such as a common telephone number, prior common ownership, interchange of personnel and services and inadequate identification of the secondary employer, etc., for the more essential aspects of the relationship in *Empire* which destroyed the secondary employer's neutrality. *Empire* represents a classic example of a "straight line operation."[3] In *Empire*, Service, the secondary employer, engaged in the cartage business in the City of Atlanta almost for the exclusive benefit of Empire Express, the trucking company. The situation presented by the instant case, where two essentially separate and independent production operations were split apart and

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[3] The National Labor Relations Board coined this phrase in *Irwin-Lyons-Lumber Co.*, 87 NLRB 54, 56 (1949), where it held that two companies were engaged in a "straight line operation" where "the Lumber Company cuts the logs, the Broom Company transports the logs down the river, and the Lumber Company saws the logs into lumber at the mill."

one sold to Forman, the primary employer, is different, and cannot be characterized as a "straight line operation", as the phrase is used in reference to the situation in *Empire*. The finding of the district court that Vulcan is a neutral secondary employer is not clearly erroneous.

II. Liability.

The next issue presented by this appeal is whether the district court's finding that the Unions conducted the strike in such a manner as to result in a violation of the secondary boycott provisions of Section 8(b)(4) of the Act and thus be liable for damages under Section 303 is clearly erroneous.

The strike was authorized by both the Local and the International after a vote of the Forman production and maintenance employees. Although none of the Vulcan employees participated in the strike vote, neither did any of them report for work from the commencement of the strike at midnight, February 13, 1968, until it ended on March 15, 1968.

The picket line instituted by the Unions on February 14th was placed on the access road leading to the entrance gates of both the Vulcan and Forman facilities, in such a way that Vulcan employees would have to cross the picket line to report for work. Although the Forman employees had continued to use the Vulcan gate after the transfer of the concrete plant to Forman and up until the strike, a second gate was in existence next to the original Vulcan gate and designated for the use of Forman employees. On February 14th, a Mr. Wyatt Brock, Vulcan's Southeast Division Manager of Administration, requested that the picket line be moved to the gate designated for the use of the Forman employees, but the Unions refused and continued to picket along the access road for the duration of the strike. On March 4, 1968, a new gate into the Vulcan slag plant was opened above the existing gate and outside the Unions'

picket line, but in full view of it. The gate was called to the attention of the Unions, but Vulcan employees refused to utilize the gate and continued to refuse to return to work.

Instead of using Forman employees, International Representative Ryan placed two Vulcan employees, Union Zone Committeeman McAdams and Local Committeeman Stracener,[4] in charge of the picket line. McAdams, who was on the line daily, was the highest paid Union employee at either Vulcan or Forman during the strike and he was looked to for leadership at the picket line by his fellow Union members. Although stating that he urged Vulcan employees to return to work, McAdams also testified that he told them that he himself would not cross the Forman picket line. Neither Local President Brewster nor International Representative Ryan repudiated these statements, and at no time did they or McAdams take affirmative action to require Vulcan employees to return to work.

International Representative Ryan received several indications that the Vulcan employees were planning to join the Forman employees on strike before February 13th, but took no action other than urging individual Vulcan employees not to strike. At a general meeting of the Local on February 15, 1968, President Brewster advised the membership of the strike and remarked that striking members would appreciate people stopping by the picket line for encouragement.

A special union meeting was called on February 21st in response to a telegram to Ryan advising him that unless the Vulcan employees returned to work, legal action in behalf of Vulcan would be forthcoming. At this meeting Ryan told the Vulcan employees that they "were not violating any laws"; Zone Committeeman McAdams, the official in charge of the picket line, thanked each of the members for

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[4] During the course of the strike, Stracener was transferred from Vulcan to Forman.

the support given him during the strike and reaffirmed his intention not to cross the picket line and return to work at Vulcan until a settlement was reached with Forman; and Committeeman Stracener (now a Forman employee) gave a general report on the strike. However, no affirmative action was taken at the meeting to compel the Vulcan employees to return to work.

A second special meeting was called on February 28th as a result of Vulcan filing of an unfair labor practice charge against the Unions. At this meeting, Ryan advised the Vulcan employees that if they "continued to refuse to cross the picket lines of Forman Concrete, then they should sign an affidavit stating they were acting on their own and were not doing so on the advice of the Local or International Union."[5] After discussion, the affidavit was signed by all the Vulcan employees and they continued to remain away from work.

On March 6th, Brock, Vulcan's Southeast Division Manager of Administration, visited the picket line and was told in the presence of a number of Vulcan and Forman employees, "that [Vulcan] employees had decided not to go to work until Forman had a contract." During the same discussion, a Forman employee told Brock, in the presence of the others, that "when Vulcan wants this strike settled, it would be settled," and those present including McAdams, nodded in agreement with the statement. On the same day Brock advised Ryan over the telephone of the possibility that Vulcan would bring in supervisory personnel to operate its slag plant. Ryan responded that to do so would cause Republic Steel, whose employees the Unions represented

[5] The affidavit reads:

> We work at Vulcan Materials in Gadsden and belong to the same local as men at what is now called Forman Ready Mix. The Local and International told us that we are not on strike and have a contract and should return to work. As individuals we have decided to work.

and who supplied raw materials to Vulcan, to go down, and very pointedly suggested that to do so might cause a reoccurrence of the Bowman situation.[6]

On the basis of these facts, the district court found that "[t]he strike was conducted by both the Local and the International as a joint venture, and in carrying on the strike in a manner that impinged upon the protected rights of Vulcan, they cannot escape liability for damages under 29 U.S.C.A. § 187 proximately resulting from a violation of the secondary boycott provisions of the Labor Management Relations Act. 29 U.S.C.A. § 158(b)(4)(i)(ii)(B). The Unions contend that this finding is clearly erroneous. We cannot agree.

The Unions are guilty of violating Section 8(b)(4) of the Act and hence liable under Section 303 if they or one of their agents "engage[d] in or . . . induce[d] or encourage[d] any individual employed by [Vulcan] to engage in, a strike or a refusal . . . to perform any services"; or "threaten[ed], coerce[d] or restrain[ed] [Vulcan]," with the object of "forcing or requiring [Vulcan] . . . to cease doing business with [Forman] . . .". See Section 8(b)(4)(i)(ii)(B) of the Act; 29 U.S.C. § 158 (b)(4)(i)(ii)(B).

There can be no question but that the Unions engaged in a strike against Vulcan: at no time during the Unions' strike again Forman did a Vulcan employee report for work. It is well established that as long as a union is functioning as a union it must be held responsible for the mass action of its members. *United States* v. *International Union, U.M.W. of A.*, D.C. 1948, 77 F. Supp. 563, 566, aff'd. 85 U.S. App. D.C. 149, 177 F. 2d 29, cert, den. 338 U.S. 871 (1949). *Accord United Textile Workers* v. *Newberry Mills, Inc.*, W.D. S.C. 1965, 238 F. Supp. 366, 373, aff'd. 4 Cir., 1963, 315 F. 2d 217, cert. den. 375 U.S. 818; *Portland Web Pressmen's Union* v. *Oregonian Pub. Co.*, D.

[6] The phrase "Bowman situation" refers to an earlier strike in the Gadsden area marked by serious violence, shootings, etc.

Ore. 1960, 188 F. Supp. 859, 866, aff'd. 9 Cir., 286 F. 2d 4, cert. den. 366 U.S. 912 (1961).

It is equally clear that the Unions, through their agents, induced and encouraged[7] the Vulcan employees to refuse to report to work. Instead of taking steps to "overcome the normal appeal of a picket line" as required by *Superior Derrick Corp.* v. *N.L.R.B.*, 5 Cir., 1960, 273 F. 2d 891, cert. den. 364 U.S. 816,[8] the Unions used the picket line to induce and encourage Vulcan employees to refuse to work by placing Vulcan employees in charge of the picket line and by permitting and encouraging other Vulcan employees to be present at the picket line assisting Forman employees. Moreover, Vulcan employees were told at least twice that the picket line was legal and recognized by the Unions, it being the Unions' expressed policy that such picket lines

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[7] *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 701-02, 71 S.Ct. 954, 95 L.Ed. 1299 (1951), held that "the words 'induce and encourage' are broad enough to include in them every form of influence and persuasion." *Accord. Truck Drivers & Helpers L. U. No. 728* v. *N.L.R.B.*, 5 Cir., 1959, 265 F. 2d 439.

[8] In *Superior*, this court said:

> ". . . if there is an exception or a hope or a desire that employees for the secondary employer will be induced or encouraged to take *concerted* actions so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity . . . It is not, as the Moore Dry Dock doctrine phrased it, merely a question of negativing the existence of a *dispute* with the secondary employer. The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids — pressure on the primary employer through pressure from the secondary employer because of concerted pressure of secondary employees on the secondary employer . . . The law forbids such pressure whether the means be crude or sophisticated. The prohibition is continuous from the outset to the end. . . Neither signs nor pamphlets nor silence automatically insulate the activity. 273 F. 2d at 897."

Accord. Brown Transport Corporation v. *N.L.R.B.*, 5 Cir., 1964, 334 F. 2d 30, 36.

should be honored, and by McAdams, the Unions' agent in charge of the picket line and erstwhile Vulcan employee, that he would not work for Vulcan while the Union struck Forman. These statements clearly constituted inducement or encouragement not to work. See *Local Union No. 789, Int'l. Hod Carriers', etc. (Ceco Corp.)* 125 N.L.R.B. 571, 573 (1959); *General Drivers, Salesmen, etc., Local No. 984 (The Humko Co., Inc.)* 121 N.L.R.B. 1414 (1958). The Unions also "induced and encouraged" the Vulcan employees to stay away from work in violation of Section 8(b)(4) by calling the special meeting for February 28th to present an affidavit[9] written in collective language for Vulcan employees to sign if they were going to remain off the job. *Truck Drivers & Helpers Local Union No. 728* v. *N.L.R.B.*, 5 Cir., 1964, 332 F. 2d 693, 697, cert. den. 379 U.S. 913; *Truck Drivers & Helpers L. U. No. 728, etc.* v. *N.L.R.B.*, supra, 265 F. 2d at 443. Finally, the Unions induced and encouraged Vulcan employees to stay off the job by their failure to take positive action to diminish the observable secondary effects of their strike against Forman. *Superior Derrick Corp.* v. *N.L.R.B.*, supra.

Likewise, agents of the Unions threatened and coerced Vulcan for the purpose of causing Vulcan to cease dealing with Forman in violation of Section 8(b)(4) by threatening to close down Republic Steel, Vulcan's sole supplier of slag for the Gadsden plant, whose employees the Unions also represented, and by threatening that there would be a reoccurrence of the Bowman situation,[10] if Vulcan brought in supervisory personnel to run the slag plant.

The Unions contend that the evidence adduced at trial was insufficient to establish the responsibility of either the International or the Local for any conduct violative of the Act and thus that the district court's findings that the strike was conducted by the International and the Local as a

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[9] See n. 5, supra.

[10] See n. 4, supra.

joint venture and that the damages assessed against the Unions were proximately caused thereby is clearly erroneous. Again, we cannot agree.

First of all, the National Labor Relations Act specifically provides in Sections 2(13) and 301(e) that

> In determining whether any person is acting as an agent for another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or ratified shall not be controlling.

In other words, the acts of a union agent committed within the scope of his general authority is binding upon the union regardless of whether it was specifically authorized or ratified. See also *Int'l. Longshoremen's and Warehousemen's Union (Sunset Line & Twine Co.)* 79 N.L.R.B. 1487, 1507-08 (1948). As for the International's responsibility, International Representative Ryan was a direct participant in the Forman strike and the resulting secondary boycott of Vulcan, and, even though he may have advised Vulcan employees to return to work, he never took action which could reasonably have been expected to effectuate this end and thus can be said to have, at the very least, acquiesced in and condoned the illegal activity. See *Local Union 984, Int. Bro. of Teamsters, etc.* v. *Humko Co.*, 6 Cir., 1961, 287 F. 2d 231, 243, cert. den. 366 U.S. 962. The same can be said of Mr. Brewster, the president of the Local, regarding the Local's responsibility. The Unions' attempt to avoid responsibility for Zone Committeeman McAdams' conduct on the ground that he was a minor official elected by Vulcan employees only (before Forman bought the concrete plant) instead of the entire Local membership. The fact remains, however, that he was chosen by representatives of both the International and the Local to be in charge of the picket line and his acts in that regard were that of their agent. See *Truck Drivers & Helpers Local Union 728* v. *N.L.R.B.*, supra, 332 F. 2d 697. Moreover, since the Inter-

national and the Local were acting in concert, they are responsible for the conduct, not only of their own agents, but of each other's agents. See e.g. *Local Union 984, Int. Bro. of Teamsters, etc.* v. *Humko Co.*, supra.

The district court's finding that the Unions were liable under Section 303 of the Act is not clearly erroneous.

III. Damages.

The final issue of importance is whether the district court's determination of damages can be sustained under the clearly erroneous rule.

The measure of damages in a Section 303 suit has been clearly articulated by this court in *Sheet Metal Wkrs. Int. Ass'n., Loc. 223* v. *Atlas Sheet Metal Co.*, supra, 384 F. 2d at 109:

> Section 303 of the N.L.R.B., 29 U.S.C. § 187, permits any person injured in his business or property as a result of a section 8(b)(4) violation to bring suit to recover the damages he has sustained plus the costs of the suit. The statute is compensatory in nature . . . and damages may only be recovered for actual losses sustained as a result of the unlawful secondary activity. While the employer must prove that he has sustained some injury to his business or property, he need not detail the exact amount of damages suffered. It is sufficient if the evidence supports a just and reasonable approximation. (Citing *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931)).

Atlas also specifically held that damages could include the costs of any reasonable legal action to bring about a resumption of work, *Id.* at 110.

The Union's principal contention regarding damages is that Vulcan failed to mitigate its damages when it reasonably could have done so, and hence failed to prove that its

losses were caused by the Unions' unlawful secondary activities, by neither attempting to operate the slag plant nor have truckers pick up the slag on hand for delivery to its customers through the use of supervisory personnel. A plaintiff in a Section 303 suit clearly has the duty to minimize damages if it is reasonably possible to do so. *International L. & W. Union* v. *Hawaiian Pineapple Co.*, 9 Cir., 1955, 226 F. 2d 875, 880 cert. den. 351 U.S. 963; *International Longshoreman's etc.* v. *Juneau Spruce Corp.*, 9 Cir., 1951, 189 F. 2d 177, aff'd. 342 U.S. 237 (1952). However, it was not reasonably possible for Vulcan to minimize damages; Vulcan could not reasonably be required to curtail their other operations in order to supply the personnel necessary to operate the Gadsden slag plant, particularly in view of the threats of March 6th by the Unions to shut down Republic Steel if supervisory personnel were brought in to operate the plant and to refuse to allow trucks out of the plant. The Union cannot have it both ways; it cannot engage in unlawful secondary activity designed to shut down an industrial operation and then claim that the plant should have been operated during the strike to minimize damages. As to the specific items of damages, it cannot be said that the finding that they were caused by the secondary work stoppage or that they are just and reasonable approximations of the actual amount of damages sustained is clearly erroneous.

IV. Arbitration.

In conclusion, mention must be made of the Unions' contention that the district court should have granted their motion to stay pending arbitration under a clause in their collective bargaining agreement with Vulcan providing that the parties should submit to arbitration "any local trouble aris[ing] in any plant." This matter is controlled by *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. Union*, 2 Cir., 1966, 359 F. 2d 598, 603, cert. den. 385 U.S. 832,

where it was held in a Section 303 suit where arbitration was sought under a broad arbitration clause that

> . . . absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intend to withdraw such disputes from judicial scrutiny.

The arbitration provision here in question contains no "clear, explicit . . . statement . . . directing an arbitrator to hear and determine the validity of tort damage claims." The motion to stay pending arbitration was properly denied.

The judgment of the district court in favor of Vulcan and against the Unions is hereby

AFFIRMED.

IN THE

United States Court of Appeals

No. 28359

VULCAN MATERIALS COMPANY,
Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
and UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 2176,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 22, 1970, 5 Cir., 1970, _____F. 2d_____).

(SEPTEMBER 18, 1970)

Before DYER, SIMPSON and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

U.S. DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA

VULCAN MATERIALS COMPANY

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al*

No. 68-104

(MAY 19, 1969)

GROOMS, District Judge: This case is before the Court for decision on the merits. The evidence was heard *ore tenus*. The parties have supplied the Court with extensive and exceptionally well written briefs. These have been carefully considered. The principal authorities relied on have been analyzed in relation to the material facts presented in the evidence.

1. The plaintiff, Vulcan Materials Company, has a slag producing plant located in Gadsden, Alabama. Adjacent to this plant is the concrete producing facility of Forman Ready-Mix Company, which is located on land formerly owned by Vulcan. A strike began at Forman Ready-Mix on February 14, 1968. This strike lasted until March 15, 1968. The case arises out of that strike which the plaintiff alleges was not confined merely to Forman and had secondary ramifications which injured its business. Damages are sought under the "secondary boycott" provisions of the Labor Management Relations Act. 29 U.S.C. § 158(b)(4)(i)(ii)(B), and § 187.

2. The specific facts surrounding the Forman strike of February 14, 1968, would not be meaningful without certain background information. This is true in that prior to December 29, 1967, what is now Forman Ready-Mix was a part of Vulcan Materials Concrete Products Division. On

that date the Concrete Products Division was sold to Forman Ready-Mix Company, a division of Kyle, Inc. Both Kyle and Forman are largely composed of former Vulcan employees. Before the sale of the concrete facility, Vulcan's slag operation supplied a limited amount of raw material slag needed in the concrete production that required slag. Likewise, after the sale Vulcan continued to supply Forman with this raw material slag.

3. In the years preceding the disposition of Vulcan's Concrete Products Division, the production and maintenance employees of Vulcan's entire Gadsden facility, both concrete and slag had been represented by the defendants, United Steelworkers of America, AFL-CIO, and Local Union No. 2176. The same collective bargaining agreement covered both sets of employees. In late 1967, this agreement was due to be renewed. Negotiations began, and during these negotiations Vulcan Materials informed the Union that its Gadsden Ready-Mix facility would be sold. The Union thereupon proposed joint negotiations between it, Vulcan, and Kyle, the prospective purchaser of the concrete facility. Vulcan, however, refused this proposal, and separate negotiations followed between Kyle and the defendants.

4. On December 31, 1967, Vulcan Materials reached a three-year collective bargaining agreement with Local Union No. 2176 covering the production and maintenance employees of its Gadsden slag processing plant. Union negotiations with Kyle continued, but no agreement was reached. The strike which began at Forman on February 14, 1968, was in support of Union demands previously made during their collective bargaining negotiations.

5. Inevitably, transfer of employees and operations from one company to the other of necessity would be attended with certain overlap and complications. Indeed, it would not be logical in a sale such as the one effected between Vulcan and Kyle to expect an instantaneous changeover of

operations, and this was recognized in the informal agreement between the two respecting the interim sharing of certain work and expenses incident thereto. When Forman Ready-Mix Company began operation of the former Vulcan concrete plant in Gadsden on January 1, 1968, until the beginning of the strike on February 14, 1968, an overlap into the former Vulcan operation did occur.

6. Examples of this overlap were as follows. The concrete trucks which Forman purchased from Vulcan remained painted the traditional Vulcan color and evidenced the Vulcan symbol. The same telephone number served outside calls for both Vulcan and Forman. Employees of both companies used the same time clock, and the time cards of employees of both companies were intermingled in a common rack. Additionally, both companies utilized a common paymaster. However, each employee was paid by a check bearing identification of his respective company. Further, an inter-office telephone system operated between both plants, and the Vulcan Materials gate was used by employees of both facilities.

7. The infusion between Vulcan and Forman was also evidenced on the employee level. The truck dispatcher for Vulcan Materials also operated as dispatcher for Forman. A former employee, Mr. W. W. Spray, testified that he directed the operations of the Vulcan Materials Company's front end loader and dump trucks. Certain clerical services were intertwined. Mr. Al Harris, a salesman for Forman, appears to have continued to take orders for both companies after the sale, and Vulcan employee Anderson continued to perform functions for Forman.

The complaint of Vulcan Materials Company, as amended, contains two counts. In the first count Vulcan alleges that during the Forman strike members of the defendant Union picketed the access route to its Gadsden plant and "induced or encouraged" its employees to refuse to work, thus attempting to force Vulcan to cease doing

business with Forman. In the second count plaintiff asserts that the defendants picketed its access route and thereby "threatened, coerced, and restrained" plaintiff with an object of causing Vulcan to cease doing business with Forman. Liability then is clearly predicated upon the "secondary boycott" concept.

9. The strike at Forman Ready-Mix began at midnight on February 13, 1968. The letter notifying Forman of the strike was signed by Mr. Jack Ryan, who was the full time International Union representative in the Gadsden area. The production and maintenance employees of Forman had voted for the strike. The strike was officially recognized by both Local Union No. 2176 and the International, United Steelworkers of America, AFL-CIO. The employees of Vulcan Materials did not participate in the voting for the Forman strike. Neither did the production and maintenance employees of Vulcan themselves vote to strike. Yet, on February 14, 1968, when the strike at Forman began, neither employees of Forman nor Vulcan reported to work.

10. The picket line supporting the Forman employee demands was established as soon as the strike began. The placement of the picket line on the access road leading into the Vulcan plant was repeatedly emphasized in the plaintiff's testimony. This was due to the fact that when the Vulcan concrete operation in Gadsden was sold to Forman separate gates along the common access road had been designated into the respective plants.[1] Vulcan's contention is that if the strike was solely against Forman, then the strike picket line should have been established solely at the Forman gate, in order not to interfere with Vulcan's business. This however was not the case, the picket line having been established on the access roadway leading into the Vulcan plant at a point where Vulcan employees would have to cross in order to get to work. That Forman employees had

[1] Employees of either could reach their place of employment through either gate.

continued to use the Vulcan gate even after the sale of the concrete operation was the apparent justification for this placement of the picket line. Nonetheless, on February 14th Mr. Wyatt Brock of Vulcan Materials requisted specifically that the picket line be moved to the Forman gate. The request was denied, and the Union continued to picket along the access route throughout the duration of the strike.

11. The Forman picket line had been established by Union members Willie McAdams and B. O. Stracener. The general mechanics of the picket line was in their realm of responsibility. Besides these general responsibilities, Stracener was also in charge of the picket roster. Both McAdams and Stracener were employees of Vulcan Materials Company; both were on the strike committee; and both had signed the Vulcan collective bargaining agreement. However, during the strike, on February 20th, Stracener shifted from Vulcan to Forman when he was rolled by virtue of an interim agreement with the defendants respecting seniority rights as between the employees of the employers. He was then replaced as grievance committeeman on February 21st by Jack Early.

12. Being in charge of the picket line, Zone Committeeman McAdams was at the line daily. As the highest paid Union employee at either Vulcan or Forman during the strike, he was looked to for leadership at the picket line by fellow Union members. Although stating that he told Vulcan employees to go to work, McAdams also testified that he told the workers that he personally would not cross the Forman picket line. McAdams was apparently steeped in the singularity of the adjoining concrete and slag plants and could not visualize the division which the sale of the concrete plant had effectuated. Not wanting to abandon his "brothers," McAdams refused to return to work throughout the strike. His only overt acts to attempt to get the Vulcan employees back to work were verbal admonitions. At no time did he exercise affirmative action in order to compel

Vulcan employees to return to their jobs, or set an example by going to work himself.

13. Although the specific responsibility for the conduct of the Union members at the picket line was on McAdams and Stracener, overall responsibility ultimately fell on International Representative Ryan, and the president of Local No. 2176, Dudley Brewster. Both of these men were full time salaried Union employees. Brewster was the highest officer of the Gadsden Local. At a general meeting of the Local Union on February 15, 1968, the day following the beginning of the Forman strike, Brewster advised the membership of the strike, and remarked that striking members would appreciate people stopping by the picket line for encouragement. Brewster further testified that throughout the strike he visited the picket line to see how things were going and to encourage the men.

14. Ryan likewise testified that he stopped by the picket line on several occasions. Always, he said, he urged Vulcan employees to return to their jobs, since Vulcan was not on strike. Ryan specifically testified that on the first day of the strike he asked senior Vulcan employee Red Knox to leave the picket line, realizing that Knox's presence there might be a signal to other employees not to work.

15. Besides visiting the picket line and talking to the men, Ryan also called two special Union meetings specifically relating to the Forman strike. The first of these special meetings was held on February 21, 1968. This meeting was prompted by a telegram to Ryan advising him that unless Vulcan employees returned to work, legal action would be forthcoming.

16. At the February 21st meeting Committeeman McAdams thanked each member of Forman for the support given him during the strike. He also reaffirmed his personal conviction not to cross the Forman picket line. Representative Ryan stressed that the Union was not on strike against Vulcan Materials. However, no affirmative action

was taken at the meeting to compel the Vulcan employees to work.

17. The second special meeting of the Union was called by Ryan on February 20th. This meeting had been precipitated by an unfair labor practice charge filed by Vulcan Materials earlier that week. At the meeting Ryan advised the Vulcan employees that if they "continued to refuse to cross the picket lines of Forman Concrete, then they should sign an affidavit stating they were acting on their own and were not doing so on the advice of the Local or International Union." All of the Vulcan employees signed the affidavit which reads as follows:

> "We work at Vulcan Materials in Gadsden and belong to the same local as men at what is now called Forman Ready-Mix. The local and the International have told us that we are not on strike and have a contract and should return to work. As individuals we have decided not to work."

This affidavit, as the minutes of the meeting indicate, was signed by the Vulcan employees in each other's presence after a discussion of the issues.

18. On March 4, 1968, a new gate into the Vulcan slag plant was opened. The "third gate," located above Vulcan's existing gate, was without the picket line but was in full view of it. The gate was called to the attention of the Union, but Vulcan employees refused to utilize the gate and continued to refuse to return to work.

19. Subsequently, on March 6th, Wyatt Brock of Vulcan alerted Representative Ryan to the possibility of bringing in supervisory personnel to run the Gadsden plant. Ryan responded by innuendo that to do so would cause Republic Steel in Gadsden to go down. On this same date Brock visited the Union tent erected near the picket line. During this visit he was advised by Committeeman McAdams that Vulcan employees were not going back to work

until Forman employees had reached an agreement. The Forman "brothers" would not be required to sit out the strike alone, McAdams indicated. On this same occasion Committeeman Early stated that when Vulcan wanted the strike settled it would be settled. The Vulcan employees again refused to return to work. Brock later called in two supervisory personnel from Birmingham to do minimum work at the Gadsden plant.

20. The strike at Forman Ready-Mix Company ended on March 15, 1968. At no time during the strike had a single Vulcan employee returned to work. Further, Vulcan employees throughout the strike were at the picket line assisting the Forman employees. When the Forman strike terminated, both Forman and Vulcan employees immediately returned to their jobs.

21. Neither Forman nor Vulcan was a predominant customer of the other's products. They were engaged in different businesses, which produce different products.

22. There was no interweaving or integration of the economic fortunes of Vulcan and Forman. There was no overlapping of management functions. There was no actual common control of one by the other, or common ownership.

23. Vulcan was a neutral secondary employer.

24. The strike was conducted by both the Local and the International as a joint venture, and in carrying on the strike in a manner that impinged upon the protected rights of Vulcan they cannot escape liability for damages under 29 U.S.C.A. § 187 proximately resulting from a violation of the secondary boycott provisions of the Labor Management Relations Act. 29 U.S.C.A. § 158(b)(4)(i)(ii)(B). Although claiming that they acted individually, the Vulcan employees refused in mass to go to work or to cross the picket line. Under the facts here shown to exist neither the Local nor the International can insulate itself from liability on the basis that the members were exercising their individ-

nal rights. Truck Drivers and Helpers Local Union No. 728, etc. v. N.L.R.B., 5 Cir., 265 F. 2d 439.

25. Brock acting for Vulcan acquiesced in Ryan's request to be given a week to persuade the Vulcan employees to return to work.

26. No disciplinary action was taken against any of the Vulcan employees pursuant to Article XII of the constitution of the International. Section 1 of said Article provides that:

> "Any member may be penalized for committing any one or more of the following offenses: (a) violation of . . . any collective bargaining agreement . . . (n) deliberately interfering with the performance of the organization's legal or contractual obligations."

Section 2 provides that upon conviction a member may be "fined, suspended or expelled."

27. Plaintiff, having been injured in its business or property by reason of an unfair labor practice, is entitled to "recover the damages by him [it] sustained . . ." Section 187. Such damages are construed to mean "actual losses sustained." Sheet Metal Workers v. Atlas Sheet Metal Co., 5 Cir., 384 F. 2d 101, 65 LRRM 3115.

28. Plaintiff is entitled to recover the reasonable cost paid to Republic Steel Corporation for removing the slag during the period of the strike. To suit its own purpose Republic spread out the slag as added fill in its storage area and thereby incurred $2,475.00 additional expense for bulldozing. It treated the slag as its own, which apparently it had a right to do, since Vulcan had not accepted delivery. The expenditures which it made were made for the account of Vulcan. The rule is that in the case of injuries to property, or for breach of contract, the owner is not justified in expending more than the property or contract is worth in an effort to lessen damages. 22 Am. Jur. 2d § 169 at 239 Note 6 and cases cited. If Vulcan had owned the slag and in order to preserve it from loss on account of defendants'

wrongdoing it had expended more than $16,000.00, under the rule referred to, it could recover no more than the property was worth, namely, $11,020.36, which was the price Vulcan agreed to pay Republic for the 27,633 tons involved at the rate of 43½ cents per ton. This in the Court's opinion is the maximum that the plaintiff can recover although Vulcan paid Republic more than that sum.

29. Plaintiff is entitled to recover the profit on the lost sales volume of 19,895 tons at $ .316 per ton, amounting to $6,286.00. Plaintiff is not entitled to recover lost profits on the 27,633 tons of slag disposed of by Republic. In the first place it didn't own this slag and was not charged for same. It is not shown that it lost any production because of its non-delivery. As soon as the strike was concluded other slag was available without any interruption in operations.

30. Plaintiff cannot have both profit and expenses to which it was put in making the profit. 25 C.J.S. Damages § 46 at 760 Note 64.10. However, the Court is of the opinion that plaintiff is entitled to recover the extraordinary expense not normal to its operations, namely:

1. Extra freight charge on shipment of chemical stone from Glencoe to Republic plant in Alabama City	$2,784.00
2. Attorney's fees	3,420.00
3. Salaries and expenses of supervisory personnel brought in from other plants to maintain plant at Alabama City	386.00
4. Rental of loader at Alabama City to replace loader placed at rail siding for shipment of chemical stone	725.00
	$7,315.00

Plaintiff is entitled to recover these items together with the sums referred to in paragraphs 28 and 29, totalling

$24,621.36. All other claimed items of damages are disallowed.

11. Defendants are not entitled to an abatement of damages based on the acquiescence of Brock in Ryan's request to be given a week to persuade the Vulcan employees to return to work. This acquiescence was based upon a *quid pro quo*. The strike was not settled, consequently the condition was not met.

A judgment will be entered in accordance with the foregoing findings and conclusions.

Judgment

Pursuant to the Opinion filed herewith,

It is ORDERED, ADJUDGED and DECREED that the plaintiff, Vulcan Materials Company, a corporation, have and recover of the defendants, United Steelworkers of America, AFL-CIO, an unincorporated association, and United Steelworkers of America, Local Union No. 2176, an unincorporated association, the sum of $24,621.36, together with costs of court.